

**Sloan's Supermarkets, Inc. and Juan Soto, Case 2-  
CA-19348**

27 January 1984

**DECISION AND ORDER****BY CHAIRMAN DOTSON AND MEMBERS  
ZIMMERMAN AND HUNTER**

On 30 June 1983 Administrative Law Judge Joel P. Biblowitz issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions and to adopt the recommended Order.<sup>1</sup>

**ORDER**

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Sloan's Supermarkets, Inc., New York, New York, shall take the action set forth in the Order.

<sup>1</sup> In the absence of exceptions, we adopt pro forma the judge's conclusion that Juan Soto's activity would constitute activity protected by the Act even if he had not acted in concert with employees Aquino and La-Jarde.

**DECISION****STATEMENT OF THE CASE**

JOEL P. BIBLOWITZ, Administrative Law Judge: This case was tried before me on May 3, 1983, in New York, New York. The complaint and notice of hearing issued on February 11, 1983, based on an unfair labor practice charge filed on January 6, 1983, by Juan Soto. The complaint alleges that Sloan's Supermarkets, Inc. (Respondent) violated Section 8(a)(3) of the Act by discharging Soto because he protested to Respondent that it was failing and refusing to comply with the terms of the collective-bargaining agreement between it and Local 338, Retail, Wholesale and Department Store Workers Union, AFL-CIO, herein called the Union, regarding coffeebreaks. The complaint also alleges that Respondent threatened to discharge Soto due to these activities and threatened its employees with unspecified reprisals and more onerous and less desirable terms and conditions of employment if they continued to concertedly complain to Respondent about its lack of compliance with the coffeebreak provisions of its collective-bargaining agreement, or if they contacted the Union in that regard, in violation of Section 8(a)(1) of the Act. Respondent denies all the substantive allegations, and defends the

8(a)(3) allegation on the ground that Soto quit his employment with Respondent.

Upon the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the parties, I make the following

**FINDINGS OF FACT****I. JURISDICTION**

Respondent, a New York corporation with its principal office located in the city and State of New York, is engaged in the retail sale of food, beverages, and related products at supermarkets throughout the area, including one located at 2589 Broadway in the city and State of New York, the facility involved herein. Respondent annually derives gross revenue in excess of \$500,000 and purchases and receives at its New York, New York office and place of business products, goods, and materials valued in excess of \$10,000 directly from firms located outside the State of New York. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

**II. LABOR ORGANIZATION STATUS**

Respondent admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

**III. THE FACTS**

The Union represents all Respondent's store employees (full time or part-time) excluding store managers, butchers, and meatwrappers. The collective-bargaining agreement provides that "any employee working at least eight hours on any day shall be entitled to one continuous hour for meals on such day." The agreement also provides: "All full time employees shall be given two 15 minute rest periods daily, and all part time employees shall be given a 15 minute rest period for each 4 hours worked each day. . . ." Also relevant to this proceeding is article X of this agreement, which provides that Respondent's right to discharge employees is "subject to authorization by the Employer's President or Vice President for personnel and industrial relations or their other specific designee."

Soto began his employ with Respondent at its store located at 2589 Broadway in New York City, also known as store no. 2. He was always employed as a part-time employee; in 1982, he worked 4 hours a day, 4 days a week, together with 8 hours on Saturday and 8 hours every other Sunday.

According to the General Counsel's case, the difficulty herein was the direct result of the actions of Otilio Gonzales, assistant manager of Respondent's store no. 2, in not granting its employees the breaks they were entitled to under the collective-bargaining agreement recited above. Gonzales had previously been employed by Respondent for 6 years (2 years of which was as an assist-

ant manager), and in about August 1982<sup>1</sup> he was transferred to store no. 2 as assistant manager. From that time until about mid-November when Bob Brown was transferred to store no. 2 as the store manager, nobody was employed at store no. 2 as the store manager. Soto testified that prior to Gonzales' term as assistant manager at the store, he and the other employees had no problem getting the breaks they were entitled to. On occasion, however, the manager requested him to take only a half hour lunch because the store was busy; but there was no problem because the manager was fair to him. Rebecca Aquino, also a part-timer, who has been employed at Respondent's store no. 2 for 7 years, testified that prior to Gonzales' tenure as assistant manager, "hardly ever" was she deprived of her proper breacktime.

Soto testified that as soon as Gonzales arrived at the store he informed the employees that he did not believe that they needed breaks, and that at the store in which he had previously been employed, the employees performed their work without asking for, or taking, breaks. He testified that his initial confrontation with Gonzales on the subject occurred approximately 2 weeks after his arrival at the store; he approached Gonzales while he was at the safe in the store and he asked for some change and a 10-minute break. Gonzales said, "listen, we're not giving breaks anymore." Soto asked him what he meant "because I understand by our agreement with the union we are entitled to a fifteen minute break when we work four hours and to . . . two fifteen minute breaks when we work eight hours. And I'm not even asking for those fifteen minutes, I'm just asking for a ten minute break." Gonzales told him that if he wanted to discuss breaks he should talk to Respondent's district manager, Rudy Evangelista. Soto said that he had nothing to say to Evangelista since breaks are given by the union contract and he might have to contact the Union to assist him in obtaining these breaks. Gonzales then said, "you could talk to anyone you want but I don't think it will help, it will be worthless because the Union belongs to the company, and anything you do in that regard will hurt you even more because the conditions of work are going to get worse and you won't get anything out of it." Shortly thereafter counsel for the General Counsel asked Soto if he took a break on this occasion; Soto testified that he told Gonzales: "I'm going to take my ten minute rest because I am entitled to it and if you don't want to [sic] too bad, but I'm entitled to it and I'm taking it." While Soto was on this break Gonzales approached him and said, "aren't you supposed to be working?" and Soto said, "I told you I was taking a ten minute break because I'm entitled to it." Gonzales told him that if he continued "doing things that I wasn't supposed to do I would get fired." Soto answered that if he were fired for this reason he would contact the Union.

Gonzales testified that "once in a while you can't give break." These are occasions when there are people on the cashiers' lines. On these occasions he lets the employee take a break at a later time or lets them leave work

early, to compensate them for the lack of a break.<sup>2</sup> Gonzales testified that he never had any discussion or problem with Soto or any other employee regarding breaks, never threatened anybody,<sup>3</sup> and never said that the Union belongs to Respondent. As for Soto, "Mr. Soto always got a break. He was always on the floor. When you're on the floor, you get a break all the time."

Soto testified that between that day and December 19, he spoke to Gonzales about breaks about three times a week:

Because every time we used to approach him and ask him for our respected break, Mr. Gonzales used to answer that we couldn't get any breaks, that in order to get breaks we have to work at least five hours . . . and if we had any questions about it, that we had to go and talk to Mr. Rudy Evangelista.

Soto testified further that on occasion he did not ask Gonzales for a break because he "knew the answer." As stated above Gonzales denies any conversation with Soto regarding breaks.

Soto testified that about early October he, Aquino, and fellow employee Jacqueline LaJarde were speaking to Gonzales near his office after they finished working their shift; they told him that by the terms of the contract between the Union and Respondent they were entitled to a 15-minute break if they worked 4 hours. He told them that they were entitled to a break only if they worked 5 hours, and if they had any question they should speak to his supervisor. They told him that he was wrong; the contract was clear and he should abide by it. Aquino testified that after Gonzales' arrival at the store it was more difficult to get breaks, in that "a few times" she had to argue with him before she was given a break. On those occasions when she asked to take a break he told her that Respondent's store where he had previously been employed was busier, the employees worked harder, and did not get any breaks. Aquino testified that sometime near the end of November or early December, she, LaJarde and Soto had a discussion with Gonzales in the store. They told Gonzales that by the terms of the contract they were entitled to a break, and if they did not get it, they would go to the Union. Gonzales said that he knew that the contract provided employees with breaks,

<sup>2</sup> Gonzales' testimony on this point is not convincing. The premise is that a cashier, who was too busy to take a break, would leave 15 minutes early, for example, at 8:45 p.m. rather than 9 p.m. However, when he was asked if he punched their timecards at 9 p.m., rather than 8:45 p.m. when they actually left, he testified that he does not punch employees' timecards. When counsel for the General Counsel asked him how they were compensated for an extra 15 minutes if they had to punch out on their own, when they left, counsel for Respondent objected: "He's not competent to testify as to compensation, that's done by payroll." Gonzales then testified: "That's done by payroll." When he was next asked how "payroll" knew to pay the employee for the extra 15 minutes, he said that he did not know. When I asked if he marks the employee's timecard to indicate that she is entitled to be paid for an additional 15 minutes, he testified: "I let the manager do it." However, for the first 3 months of his tenure at store no. 2 there was no manager.

<sup>3</sup> Actually, the question and answers were:

Q. Did you ever threaten any employees including Mr. Soto, with reprisals of any kind?

A. Never had a problem with any of them.

<sup>1</sup> Unless otherwise indicated, all dates referred to herein relate to the year 1982.

but the employees have to earn it, and if they wanted to go by the books "then it could be a lot harder for that person." Gonzales testified that he did not recall any such conversation, although he did remember conversations with these employees when he told them that they had to work together for the store to operate better. Aquino further testified that, in December, Gonzales told her "that if anybody called the union something would happen to that person." They were in an aisle in the store and she had said nothing to him to prompt this statement. On cross-examination she testified that what Gonzales said was that "if anybody wanted to call the union, it's going to be a lot harder." In answer to a question from me as to whether she said anything to Gonzales prior to his statement, she testified that they were discussing breaks provided by the contract. As stated above, Gonzales testified that no employee complained that he was depriving them of their contractual rights, and also testified (as set forth in the footnote, above), that he never threatened any employee.

Soto testified that on one occasion he told Brown (with whom he had a good relationship) that Gonzales was violating the employees' rights by not giving them breaks; he did not remember when this occurred, but it took place in his office in store no. 2. Aquino also testified that she informed Brown of Gonzales' actions. Brown testified that during the period of approximately 1 month that both he and Soto were employed at store no. 2, he had one conversation with Soto regarding Gonzales: Both Brown and Soto worked alternate Sundays and Soto told him that he preferred to work with him because Brown treated him more like a gentleman. As to whether Soto complained to him that Gonzales was depriving him of contractual rights to breaktimes, Brown testified: "Not that I remember. He just said he preferred working with me." As to whether Aquino spoke to him about this subject, Brown testified: "I don't remember."

Beginning about mid-October or early November, Soto, Aquino, and LaJarde began discussing the difficulty they were encountering with Gonzales in getting breaks; sometime thereafter they decided to write an anonymous letter to the Union regarding this problem. In early December, LaJarde showed Aquino the letter that she drafted (and Aquino said that she agreed with its contents), although neither Aquino nor Soto could testify as to when the letter was actually sent.<sup>4</sup> The letter addressed to the Union and dated December 12, states:

Dear Mr. Laub:

We would like to ask you many questions about all the part-timers at Sloan's Supermarkets.

First of all, we are concerned as to why they don't give breaks. Every time part-timers ask for breaks, the managers or assistants start making a speech. They say that we are not supposed to take breaks.

We think if we work together and do what we are supposed to do, we are entitled to breaks.

<sup>4</sup> LaJarde did not testify.

I would like very much appreciate if you call our Representative (Mr. Levy) and ask him to check if all the West-Side stores are giving breaks to all part-timers. We also think it is not fair because we feel that we work hard, and try to keep the store clean and attractive. Therefore, we feel we deserve breaks without any complaints or arguments with the managers or assistant managers.

We wish you a happy and a safe New Year.

Sincerely,  
All the part-timers  
At Sloan's Supermarkets

Irving Levy, business agent for the Union, testified that to the best of his recollection his letter was first read by the Union about a week after it is dated: "I imagine it would have been received or acted on in about a week's time because when mail comes in, through the process in the office, it takes from three to five days before anything is done with anything." Levy testified that he did not know who wrote this letter; he previously had received no complaints from employees at store no. 2 regarding breaks. The Union contacted Jack Zuckerman, Respondent's vice president and director of store operations, and informed him of this letter; Respondent then issued the following "Bulletin," dated December 28, to all its stores:

TO : All Stores

FROM: Jack Zuckerman, Vice President Store Operations

RE : Coffee Breaks

It has been brought to our attention that managers are not giving coffee breaks to the employees. Let me remind you about our union contract agreement—

"All full time employees shall be given two 15-minute rest periods daily, and all part-time employees shall be given a 15-minute rest period for each 4 hours worked each day, but in no event more than 2 such periods in any day."

Make sure these coffeekbreaks are given and employees punch the back of their timecards when they take this break.

Zuckerman was questioned by counsel for Respondent and myself as to whether this December 28 bulletin resulted from the Union's notification to him of the complaint contained in the anonymous letter, or whether it was simply a periodic notification to its stores. Numerous questions and answers on this subject did nothing to clarify the issue. Below are some of his answers:

I send out these memorandums periodically when Tommy [Hayes] and Irving [Levy] come up to the store and say, some people are not getting coffee breaks, let's not fool around, so I send a memorandum just to remind them, a communication, that every employee is entitled to a coffee break.

I just wanted to remind the managers, but they come up quite frequently . . . and whenever they do come up, it reminds me of these things and I send out memorandums not only on this particular item but on the food stamp regulations, just a communication to let the store manager be aware of company policy and stay abreast of everything.

I do this by myself, but like I say, sometimes they do come up and complain that some of the employees are not getting coffee breaks. I don't know about the time element.

Finally, Zuckerman testified that he regularly sends bulletins to the stores, but could not positively testify as to the cause of the December 28 bulletin.

Soto's last day of employment with Respondent was December 19; he testified that his hours on that day (a Sunday) were the same as the store's hours: 9 a.m. to 6 p.m. When he arrived, Gonzales instructed him to bring out the dairy and meat items and place them in their respective cases. He finished these items about 11 or 11:30 a.m., and Gonzales told him to place the new prices on the items that were on "Special" for the following week; he did that for awhile, and assisted at the cash register when it got busy. At 1:30 p.m. while he was at the register, Gonzales told him to take a half hour lunch. Soto said that he had no breakfast that morning and needed an hour for lunch. Gonzales told him, "you better take half an hour or you will regret it." About 2:30 p.m. he returned from lunch, and after punching in his timecard he overheard Gonzales (in his office) on the telephone saying, "Juan, the guy who is always asking for breaks." He knocked on the door and told Gonzales that he had returned from his break and asked what he should do. Gonzales said that he was on the phone with Evangelista, who wanted to speak to him.

Soto testified that Evangelista said, "What the fuck is going on between you and Mr. Gonzales?" Soto said that Gonzales was not respecting their rights. Evangelista then said:

"[L]isten m— f—, when the guy tells you to move your ass, you move your ass, because you're getting paid for it. You're going to do what you're supposed to do in the store, what the guys tells you to do, you're fired."

Soto then answered, "Listen m— f—, it's not a matter of moving my ass or not moving my ass, it's a matter if the guy doesn't respect my rights." Evangelista "kept getting nasty" and Soto slammed the telephone down and walked out of the office and told Gonzales, "He fired me but somebody has to punch out my card and that somebody could be you or himself. You're here, so you punch out my card." Soto gave Gonzales his card and "went to put the working coat on because although he told me I was fired, my card was not punched yet, so I wanted to get ready to keep working." As he came out ready to resume working, he heard the timeclock punch a card and Gonzales tell him, "I'm glad I won't see your face again." Soto said, "oh, I'm fired?" and prepared to leave. Before leaving, Soto told Gonzales that he was fired because he did not want to work as a slave, and be-

cause he knew of his rights and he protested the violation of these rights.

The testimony of Gonzales and Evangelista regarding these events and the final phone call are substantially different; Gonzales testified that Soto arrived at work that day about 9:05 a.m., he assigned him to remove the signs for the previous week's sale items, and to replenish the items in the dairy case; "maybe he was a little slow, it took him more than an hour and a half. He finished about 11:30."<sup>5</sup> Gonzales then gave Soto a list of the specials (the sale items) for the following week; he told him to change the prices on them and to do the reversions (to remove the sale price and signs from the prior week's sale items). About 1 or 1:15 p.m. Soto told Gonzales that he was going to lunch: "he didn't ask me, he told me he was going to lunch." Gonzales told Soto that somebody was at lunch at that moment, but he would give him a lunchbreak shortly. About 1:30 p.m., Gonzales told Soto to take his lunchbreak; at the same time, Gonzales noticed that Soto had not even completed half of the specials he had assigned him to, and he asked him if he could take a half hour lunch, but Soto did not reply; he simply punched his card and walked out. A half hour later the store got very busy and he paged Soto over the store's intercom ("I figured he's probably in the store because I asked him to take half an hour lunch"), but Soto did not answer the page. Gonzales went looking for Soto and located him in the back room of the store; Soto said, "it's a half hour, I need you on the register." Soto replied, "that's your problem, not mine. My union tells me I take an hour lunch." Gonzales told him, "You want an hour lunch, take an hour lunch, it's all right." In this regard, Gonzales testified: "If you were assistant manager, how would you feel when somebody tells you that?" He also testified that he was "not really" annoyed at Soto for this. After Soto told him that he was going to take his full hour for lunch, Gonzales realized that he would need an additional employee for the day to complete the specials for the following week: ". . . the half hour meant a lot to me and I needed somebody else. If he would have taken half an hour lunch, maybe I would not have needed someone else to help with the store."

Gonzales then attempted to contact Evangelista in order to obtain an additional employee to assist him. It took approximately a half hour to locate him; he told Evangelista that he needed an additional employee for the day because Soto was slow and had fallen behind in doing the following week's specials; he also told Evangelista that Soto took an hour for lunch.<sup>6</sup> Evangelista then asked to speak to Soto, who, at that moment, was punching in his timecard, having just returned from lunch. Gonzales told Soto that Evangelista wished to speak to

<sup>5</sup> It is not entirely clear whether Gonzales meant 10:30 or 11:30. Since Soto arrived at work at approximately 9 a.m., if he only replenished the items in the dairy case, and it took him an hour and a half, as Gonzales testified, then Gonzales probably meant to say that Soto finished at 10:30. However, if he was also referring to Soto's work on the prior week's specials, then 11:30 may be correct.

<sup>6</sup> On cross-examination, Gonzales first testified that he did not tell Evangelista that Soto took an hour for lunch; after being shown the affidavit he gave to the Board, he testified that he did tell him that Soto had taken an hour for lunch.

him; Soto made an expression that indicated that he did not want to speak to Evangelista; Gonzales said, "Juan, the phone is right here, Rudy wants to speak to you." Soto took the telephone; Gonzales only heard what Soto was saying, not what Evangelista said. He testified that he heard Soto say: "I have no problem; what's your problem?" Soto then said, "you can take this job and shove it up your ass." Soto then said, "F— you and Jack" and hung up the phone. Soto then walked out of the office. A moment later the telephone rang; Gonzales answered it, and it was Evangelista who told him to tell Soto to see Zuckerman (one of Respondent's representatives authorized by the contract to terminate employees) on the following morning. Soto returned and asked Gonzales to punch his card out; Gonzales refused, said, "you punch your own card, you're the one leaving, not me." Soto punched out his card and told him that he was a slave whom Respondent was using. He then left. Gonzales never told him that he should see Zuckerman the following morning.

Evangelista (a district manager for Respondent for 15 years) testified that on that day he received a call from Gonzales who told him that he was having a problem with Soto; he explained the assignments he had given him that morning and said the work was not being done. Gonzales also told him that Soto wanted an hour for lunch; Evangelista told him that Soto was entitled to an hour lunch by the contract, but if he agreed to a half hour that would be all right. Evangelista then told Gonzales to put Soto on the phone; Evangelista told him: "Mr. Soto, what the hell is the matter with you, what's your problem, why won't you cooperate with the assistant manager?" Soto answered: "I'm working as fast as I can, I'm not going to break my back for this shithole company." Evangelista said: "that's not the attitude you should take, Mr. Soto, you got to work as a team." Evangelista then asked: "What is your problem? How come your work is not done?" Soto said that he had no problem and was working at his own speed; Gonzales wanted him to rush, but he would not rush. Evangelista was then asked by counsel for Respondent:

Q. Did you direct him to do anything?

A. No. I said why then is Mr. Gonzales complaining about your work. I said today is Sunday, you should cooperate with the man, if he assigns you to do the work, why is it taking you so long to pack out three cases of milk. It doesn't take three hours to pack out three cases of milk. He said, I'm doing the best I can.

Q. Did you tell him to do anything?

MR. MAHER: Objection.

A. I didn't tell him to do nothing.

JUDGE BIBLOWITZ: Overruled.

Q. Did you tell him to report to Mr. Zuckerman?

MR. MAHER: Objection.

JUDGE BIBLOWITZ: Overruled.

A. Yes. With that I said, well I think if you have that kind of problem, Monday morning report to Mr. Zuckerman, Monday morning at 8 o'clock.

Q. And then did the telephone conversation terminate?

A. Then he says, f— you and Jack Zuckerman.  
Q. Did you hang up?

A. No, he hung up on me.

Evangelista testified further that he then called the store and told Gonzales to tell Soto to see Zuckerman the next morning. Soto never did go to see Zuckerman, the next morning, or anytime thereafter.

On the following day (Monday, December 20) Soto called the union office and asked to speak to his representative. He was told that Laub was on vacation and Levy was on the road, but if he would leave his telephone number, they would contact him. At the time, Soto was going to school and working part time at the school's office and he therefore gave the union secretary the school's telephone number. He waited about 4 hours at that telephone number, but never heard from the Union. He called the Union, again, a week to 2 weeks later, from his house (although he never specifically testified whether he left a telephone number for the Union to call him at on this occasion). Other than that, he never called the Union, wrote, or visited the Union to protest his termination. Soto filed a charge against the Union at the same time that he filed the instant charge against Respondent; the Regional Director approved the withdrawal of that charge on February 18, 1983.

Levy testified that he received one or two calls from Soto; he could not remember with certainty what occurred, but he believes that when he returned the telephone call Soto's mother answered the phone, but she could not speak English; Levy told her that he was returning Soto's call; Soto never returned his call. The first he knew of any problem in this regard was when he learned of the unfair labor practice case Soto filed against the Union. At that point, they attempted to proceed with a grievance on behalf of Soto; however, the contract provides that grievances must be filed within 30 days and Respondent refused to waive this provision, so nothing could be done.

In addition to filing the instant unfair labor practice charge on January 6, 1983, Soto filed a claim with New York State Department of Labor Unemployment Insurance Division. Respondent defended this claim as follows: "Mr. Soto was directed to report to the main office to speak to the Vice President of Store Operations. He never reported. We therefore assumed he abandoned his job." On April 27, after a hearing, a decision issued, which found that Soto voluntarily left his employment, without good cause.

Susan Aarons, Respondent's director of personnel, testified that her duties include disciplining and counseling employees; employees are sent to her office for nonserious offenses (excluding theft or assault); she speaks with the employee in an attempt to solve the problem; if she is unsuccessful, she recommends that the employee speak to Zuckerman or Rose, Respondent's chairman of the board, in which case a representative of the Union is present. The result of this meeting is usually a suspension or a transfer, but usually not a termination. Aarons and Zuckerman testified further that the only representatives of Respondent with the authority to discharge employees are Rose, Zuckerman, and Respondent's president, Cook,

and Karsch and Meyer, two owners of Respondent who are not involved in store operations. Evangelista testified that he does not possess the authority to discharge employees and, in fact, he has never done so. Soto testified that he was not aware of this; he thought the supervisor or manager had this authority.

#### IV. ANALYSIS

This case involves a difficult credibility determination: Both Soto and Aquino appeared to be fairly credible witnesses; although Aquino testified in a barely audible manner, this may have been due to the fact that she was still employed by Respondent, and Evangelista, Brown, and Gonzales were all present at the hearing. On the other hand, although not clearly incredible, the testimony of Gonzales, Evangelista, and Zuckerman contained some inconsistencies and contradictions and, at times, they were clearly being evasive in their answers.

*Gonzales:* Certain aspects of Gonzales' testimony disturbed me. He testified that when the cashiers are busy, rather than taking a 15-minute break, they are allowed to leave work 15 minutes early, and are paid for the time. Yet, he could not satisfactorily explain how this was done (although he has been employed by Respondent for 6 years), until he was led by counsel for Respondent to simply conclude that it was "done by payroll." In addition, in testifying about the events of December 19, and Soto's insistence on taking an hour's break, he testified that he was "not really" annoyed at Soto for his actions; yet he also testified: "If you were assistant manager, how would you feel when somebody tells you that?" Subsequent to this conversation he spent a half hour attempting to contact Evangelista about receiving additional help. If there was previously any doubt about it, the time he spent attempting to contact Evangelista demonstrates that he was disturbed by Soto's actions and remarks. Finally, he denied that any employees at store no. 2 complained about the lack of proper breaks: The credible testimony of Soto and Aquino, together with the employees' letter to the Union, convince me that this is not true.

*Evangelista* testified that, in his telephone conversation with Soto on December 19, he told him that it "doesn't take three hours to pack out three cases of milk"; however, this is contrary to Gonzales' testimony regarding his difficulty with Soto on that day. More troubling, however, in this same line of testimony is that when he was asked if he told Soto to do anything, he testified very definitively: "I didn't tell him to do nothing." It was only after he was asked, by counsel for Respondent, if he told Soto to report to Zuckerman, that he testified that he told Soto to see Zuckerman the following Monday.

*Zuckerman:* the difficulty I had with Zuckerman's testimony was his evasiveness as to the motivation for the December 28 memorandum. It is not unreasonable to assume that a memorandum that he issued about a week after the Union discussed the issue with him was caused by that discussion, especially since it begins: "It has been brought to our attention." If not, it is reasonable that Zuckerman would have remembered what other event inspired that memorandum. However, his testimony on the subject is extremely evasive.

I therefore will generally credit the testimony of Soto and Aquino over that of Respondent's witnesses, where there is a conflict. I therefore find that, about August or September, Gonzales threatened Soto that if he contacted the Union regarding the deprivation of his breaks "the conditions of work are going to get worse," and that if he continued insisting upon his rights under Respondent's collective-bargaining agreement with the Union he would be fired. I also find that, in late November or early December, Gonzales told Aquino, Soto, and LaJarde that if they contacted the Union and insisted that he act pursuant to the terms of the collective-bargaining agreement between Respondent and the Union, he would make their working conditions more difficult. I find that Soto's actions regarding the deprivation of the employees' breaktime at store no. 2 constitute both protected concerted activity (not only did he act in concert with Aquino and LaJarde, but his actions were for the benefit of the other employees as well) and union activity, as it was a right provided for in the contract between Respondent and the Union. *New York Trap Rock Corp.*, 148 NLRB 374 (1964); *ARO, Inc.*, 227 NLRB 243 (1976); *Diagnostic Center Hospital Corp.*, 228 NLRB 1215 (1977); *McLean Trucking Co. v. NLRB*, 689 F.2d 605 (6th Cir. 1982). I therefore find that the above-mentioned threats by Gonzales violate Section 8(a)(1) of the Act.

The final determination herein is whether Soto was discharged by Respondent because he engaged in these protected concerted and union activities. In this regard, Soto testified that in the December 19 telephone conversation Evangelista told him that he was fired. Evangelista testified that he did not tell him that he was fired; he could not have done so because he did not have that authority; rather, he told Soto to report to Zuckerman on Monday morning, but that Soto refused by saying, "F— you and Jack"—the statement Gonzales testified he overheard Soto making. In making this credibility determination I must consider the fact that Evangelista lacked the authority to discharge Soto, and, having been employed by Respondent as a district manager for 15 years, must have been aware of this restriction on his authority at the time. Why would he act beyond his authority and fire Soto, when he could later be embarrassed if Soto filed a grievance regarding the discharge within 30 days? There is no evidence that Evangelista was personally involved in this ongoing dispute between Soto and Gonzales and, it appears that he first learned of it when he received the December 19 telephone call from Gonzales; in this telephone conversation, according to Evangelista's testimony, Soto basically said that he was working at his own speed, would not work any faster, and referred to Respondent as a "shithole company." The testimony established that Evangelista is a frequent user of obscene and abusive language; it appears to me that Soto's response was not likely to provoke Evangelista to do something he had no authority to do—fire Soto. This conclusion is reinforced by an examination of Soto's testimony regarding this conversation with Evangelista: He testified that Evangelista told him that when Gonzales told him to work hard he was to work hard, because he was getting paid to do it. He then said: "You're going to

do what you're supposed to do in the store, what the guy tells you to do." At that point (according to Soto's testimony) Evangelista said, "you're fired." It appears to me that portions of this testimony are inconsistent and illogical: Evangelista was talking about Soto's future work performance in the store ("You're going to do what you're supposed to do in the store, what the guy tells you to do") and the next words from him to Soto are: "You're fired." Rather, I find that the more reasonable conclusion is that he told Soto to report to Zuckerman on Monday morning, which Soto failed to do. (In the midst of this argument, Soto, who was not aware of the restrictions on Evangelista's authority to discharge employees, may have interpreted the order to see Zuckerman to mean he was fired.) I therefore find that Soto was not discharged, and that Respondent therefore did not violate Section 8(a)(1) and (3) of the Act as herein alleged.

#### CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent, by Otilio Gonzales, its agent, violated Section 8(a)(1) of the Act by engaging in the following conduct:

(a) Threatening employees with discharge if they persisted in engaging in protected concerted activities, or activities on behalf of the Union.

(b) Threatening employees with more difficult working conditions if they persisted in engaging in protected concerted activities, or activities on behalf of the Union.

(c) Respondent did not violate the Act as further alleged in the complaint.

On the foregoing findings of fact and conclusions of law and on the entire record, I issue the following recommended

#### ORDER<sup>7</sup>

The Respondent, Sloan's Supermarkets, Inc., New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from threatening its employees with discharge and more difficult terms and conditions of employment if they persist in engaging in protected concerted activities, or activities on behalf of the Union.

<sup>7</sup> If no exceptions are filed as provided in Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) Post at its New York, New York office copies of the attached notice marked "Appendix."<sup>8</sup> Copies of said notice, on forms provided by the Regional Director for Region 2, after being signed by its authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notice is not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint herein be dismissed as far as it alleges that Juan Soto was discharged in violation of the Act.

<sup>8</sup> If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

#### APPENDIX

##### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, it has been found that we have violated the National Labor Relations Act and we have been ordered to post this notice.

WE WILL NOT threaten our employees with discharge if they persist in engaging in protected concerted activities, or activities on behalf of Local 338, Retail, Wholesale and Department Store Workers' Union, AFL-CIO, or any other labor organization.

WE WILL NOT threaten our employees with more difficult working conditions if they persist in engaging in protected concerted activities or activities on behalf of the above-named Union, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed in Section 7 of the Act.

SLOAN'S SUPERMARKETS, INC.